IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION.

APPEAL FR0M ORDER NO.270 OF 1996

WITH

CIVIL APPLICATION NO.178 OF 2005

Shri Anant Purushottam Athavale : Appellant.

versus

Govind Purushottam Athavale

& ors. : Respondents.

Mr.S.V.Pitre for the appellant.

Mr.G.S.Godbole for the respondents.

CORAM : D.G.DESHPANDE,J.

DATED : 6th May 2005.

ORAL ORDER :-

1. So far as the Civil Application is concerned, it is for restoration of the appeal which was dismissed by the Court on 24.11.2004 as nobody was present for the petitioner on that date. The application is allowed and disposed of. Appeal is restored to file and by consent it is taken up for final hearing.

2. The appellant/original plaintiff filed an application before the Civil Judge, Sr.Division, Pune for appointment of Court Receiver. That application came to be rejected by the lower Court and, therefore, this Appeal. I extensively heard the counsel for the appellant and respondents.

3. Appeal arises in the following background:-

. The petitioner/plaintiff filed a Civil Suit 887 of 1994 for a declaration that the partnership known as M/s.Athavale Dairy has been dissolved on 20.4.1994 and for accounts of the partnership and for giving to the plaintiff his share in the profit and assets. And it was in this suit that application came to be made by the plaintiff for appointment of court receiver. The trial Court rejected that application and, when the appeal was filed I was told by the counsel for the petitioner/plaintiff that this Court has, as per the interim order, appointed the Receiver in respect of the suit property i.e. by order dated 13.3.1996 passed by Mrs.Justice K.K.Baam

and by that order the respondents were to act as an agent of the Court Receiver upon such terms and condition as the Court Receiver may deem fit.

4. Counsel for the petitioner contended that the partnership was at Will and it can be dissolved by any partner by giving a notice to the other partners. That was done by the petitioner by giving notice to the others on 20.4.1994 and since the respondents did not make any amends, he was required to file a suit. According to the petitioner, share of the petitioner/plaintiff in the assets and profit etc. would be more than Rs.40/- lacs and, since the respondents neither giving accounts nor giving him any share, he was entitled for appointment of court receiver.

5. Counsel for the petitioner pointed out that the partnership has extensive movable and immovable properties and if due share of the plaintiff and his interest is not protected, the plaintiff would suffer irreparable loss which will not be compensated in terms of money in future. He, therefore, contended that this was a fit case to appoint a receiver in respect of the

properties of the partnership.

6. On the other hand, it was contended my Mr.Godbole, appearing for the respondents, that the partnership between the parties was not at all the partnership at Will and, therefore, the petitioner/plaintiff had no right to dissolve the partnership. He drew my attention to the partnership deed which was at Exhibit H and I am reproducing the some of the clauses of the said partnership deed upon which reliance was placed by both the side :-

> Clause 2 :- ..... The partnership business has been reconstituted as and from 7th August 1977 and the period of partnership will be as per Will of the partners.
>
> [Relief upon by the petitioner]

> Clause 11 :- If out of the partners any one retires, the partnership is not come to an end, but other partners will have a right to continue the partnership and also continue the business of the

partnership in future. Such a right is there and will be always there. But in such a case it will be responsibility of the partner and remaining partners to give an account to the retiring partner of the business of the partnership and return to him his share in the profit and loss and in the capital or assets.

[Relied upon by Mr.Godbole]

Clause 12 :- If all the partners decided to close the partnership business, then business has to be sold on the basis of goodwill and each of the partners is to be given, according to his share, the sale proceeds and, if it is decided to close the business of the partnership and if one of the partners so desires to purchase, then he will have first preferential right.

[Relied upon by Mr.Godbole]

7. Counsel for the petitioner on the basis of clause (2) repeatedly and strenuously urged that the partnership was at Will and, therefore, the petitioner/plaitniff had a right to terminate

the partnership and to claim accounts and since such accounts were not given and his share in the profit and loss as well as in the assets was not given, he is entitled for appointment of receiver.

8. He also contended that from the date of notice of dissolution given by the petitioner/plaintiff till this date the petitioner has not been paid any farthing by the respondents. The are enjoying all the properties and, therefore, there was no alternative but to appoint the court receiver.

9. So far as this aspect of the matter is concerned, Mr.Godbole for the respondents contended that the partnership business is a dairy business where in about 325 cows and buffalos were used as milking animals. The partnership was selling the milk and other milk products and such a business requires daily attention, constant and continue attention, care and looking after and, therefore, appointing a court receiver would have serious and disastrous effect on the business. so far as non-payment of dues of the petitioner/plaintiff, Mr.Godbole contended that firstly the notice of dissolution

is illegal and unwarranted; that partnership was not at Will and in any case when the petitioner immediately filed the suit after giving notice, there was no time to the respondents to pay to the plaintiff his share in the assets and profit. He also contended that clause 12 of the partnership deed has provided for the mode and manner of making accounts and, the respondents had no option to go as per that clause.

. The crucial basic question, so far as this appeal is concerned, is, whether the partnership is at Will as per clause 2 or whether clauses 11 and 12 are over-riding clause 2 of the partnership deed. My attention was drawn by Mr.Godbole in this regard to the Indian Partnership Act, particularly Section 7 which defines "Partnership at will" as under :-

> Where no provision is made by contract between the partners for the duration of their partnership, or for the determination of their partnership, the partnership is "partnership at will".

. Mr.Godbole for the respondents relied

upon the judgment of the Supreme Court reported in **AIR 1961 SC 1225 [Karumuthu Thaigarajan Chettiar and another v. E.M.Muthappa Chettiar]** where question of interpretation of Section 7 arose. In para 6 the Supreme Court along with Section 7 also considered the provisions of Section 42 and held that if the partnership is not at will, section 42 would apply. Then Supreme Court considered the terms provided for in the partnership deed in that case and tried to find out what was the intention of the partners and held that section 7 contemplates two exceptions to a partnership at will. The first exception is where there is a provision in the contract for the duration of partnership; the second exception is where there is provision for the determination of the partnership. In either of these cases the partnership is not at will. The duration of a partnership may be expressly provided for in the contract; but even where that is no express provision, courts have held that the partnership will not be at will if the duration can be implied.

. Mr.Godbole, therefore, contended that applying aforesaid ratio or principle to the

facts of the case and particularly clauses 11 and 12, it will be clear that the partnership was not at will.

10. Since clauses 11 and 12 of the partnership deed are explicitly clear it has to be held that the partnership was not at will and, therefore, the notice given by the petitioner/plaintiff could not result in dissolution of the partnership.

11. The impugned order of the trial Court rejecting the plaintiff's application for appointment of court receiver shows that the Court has also given same reasoning and apart from that it found that even though the plaintiff was contending that the partnership stood dissolve upon service of his notice, in his application for appointment of court receiver, he has contended that the partnership business was required to be continued otherwise he was going to suffer loss and, therefore, for continuation of business appointment of receiver was necessary. The court found that these two stands taken by the plaintiff were contradictory. If the partnership is at will and he has dissolved

the partnership, then there was no continuation of business and if he wanted continuation of business, then impliedly the plaintiff could not contend that he has dissolved the partnership.

12. Therefore, in law so far as this revision or appeal is concerned and since the revision is against the interim order it has to be prima facie held that the partnership was not at will and there was no dissolution and, secondly, since the prayer of the petitioner/plaintiff was for continuation of business it was contradicted his stand taken about dissolution of firm. The Court was, therefore, rightly justified in rejecting his application.

13. The another important aspect that weighed by the trial Court was that the plaintiff was having only 25% interest or share in the partnership, whereas the respondents/defendants had 75% share and, if all of them decide to continue the business, then by giving notice of dissolution, the plaintiff could not bring the partnership business to an end.

14. However, the matter does not end there

only and, the plaintiff prayer for protection of his share and interest is required to be considered. It is true that the suit came to be filed immediately after the notice by the plaintiff and, therefore, other defendants could not comply with the clauses 11 and 12. However, the suit is pending since 1994 and nothing is paid to the plaintiff by the defendants. Though the receiver is not called for in a particular circumstance, the interest of the plaintiff is required to be protected by granting liberty to the plaintiff to apply before the lower Court for appropriate reliefs asking the defendant to give security or for attachment before judgment of certain portion of the properties to secure his interest. For all these reasons the following order :-

:ORDER:

This Appeal is dismissed.

However, the Receiver to continue for a period of six weeks from today. In the mean time, the plaintiff can approach the lower Court for protection of his

interest in an appropriate manner.

Appeal disposed of accordingly.

It is clarified that the findings in this order will not came in the way of the lower court in deciding the suit on merits.

[D.G.DESHPANDE]

06/05/2005 JUDGE.